Supreme Court of the United States

OCTOBER TERM, 1963

No. 96

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, JOHN P. LOMENZO, Secretary of State of the State of New York, and DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of Elections constituting the Board of Elections of the City of New York,

Defendants-Appellees,

and

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E. DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES ROCKEFELLER, LEFKOWITZ AND LOMENZO

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Statute Involved

Extracts from the challenged statute, Chapter 980 of the New York Laws of 1961, are set forth in the complaint

(R. 3-6). The statute in question, enacted on November 19, 1961, redistricted New York for the purpose of the 1962 Congressional elections. It was made necessary by the State's loss of two seats in the House of Representatives as a result of the 1960 decennial census. See 2 U.S.C. § 2a.

Questions Presented

1. Was the District Court required to find that New York's 17th Congressional district was "contrived" to exclude "non-white citizens and citizens of Puerto Rican origin", where the sole evidence supporting this charge is (1) that a smaller percentage of such citizens resided in the 17th district than in the other three Congressional districts contained within New York County, (2) that the 17th district is the least populous of the four Congressional districts in New York County, (3) that the boundary of the 17th district does not consist solely of straight lines and does not invariably include full census tracts, and (4) that there were other conceivable ways to draw district lines so as to embrace a larger percentage of Negroes and Puerto Ricans in the 17th district?

2. (a) Does a plaintiff attacking a redistricting statute as a product of racial discrimination satisfy his burden of showing unconstitutionality merely by demonstrating that two adjoining Congressional districts in a heavily populated city do not have the same percentage composition of voters classified on a racial basis?

(b) Does such a plaintiff meet his burden of showing unconstitutionality even if he shows that the Legislature was aware that the racial composition of the two adjoining districts was not the same?

3. Do the Fourteenth and Fifteenth Amendments compel a state legislature, in drawing Congressional district lines, to disperse members of a racial minority living in

one neighborhood among two or more districts and forbid it from including the entire neighborhood in one district?

4. Is there a discoverable constitutional standard by which this Court may choose between alternative policies of concentrating a racially homogenous neighborhood in one Congressional district or dividing it among several districts?

5. (a) Can a court of equity draft a workable decree which chooses between these alternative policies?

(b) In order to draft a workable decree which upsets an existing districting statute because of a racial inbalance in the districts, must not a court of equity determine what should be the proper racial composition of each such district?

(c) Would the rights of any racial minority or of the citizens of New York in general be served by a court-ordered election at large of members of the House of Representatives?

(d) May a plaintiff challenging the constitutionality of a state statute obtain relief against the Governor of the state merely because the Governor, as chief executive, has a general responsibility to administer all the laws of that state?

Statement of the Case

A. The Pleadings.

Appellants brought this action seeking a declaration that Chapter 980 of the New York State Laws of 1961 violates the Fourteenth and Fifteenth Amendments of the Constitution of the United States and an order enjoining defendants from enforcing or executing that statute (R. 7-8). Appellants named as defendants various state and local officials who they alleged were under a duty to administer and enforce the statute (R. 2). These officials included

the Governor, Attorney General and Secretary of State* of New York, on whose behalf this brief is filed.

Appellants alleged that they are residents and voters in each of the four new Congressional districts located in New York County (R. 2). They claim that Chapter 980 "establishes irrational, discriminatory and unequal Congressional Districts in the County of New York and segregates eligible voters by race and place of origin"; that the 17th Congressional district was "contrived" to exclude "non-white citizens and citizens of Puerto Rican origin and * * * is over-represented in comparison to the other three districts in the County of New York"; and that "the 18th, 19th and 20th Congressional Districts have been drawn so as to include the overwhelming number of non-white citizens and citizens of Puerto Rican origin in the County of New York and to be under-represented in relation to the 17th Congressional District" (R. 6). Finally, they charge that "the unconstitutional districting herein complained of has existed for many years" and that the Legislature "has redrawn the boundaries of such districts in accordance with shifts in non-white population and population of Puerto Rican origin so as to perpetuate and aggravate the irrational, discriminatory and unequal districts and the segregation of voters by race and place of origin in the County of New York" (R. 7).

The state officials named as defendants answered the complaint denying all its material allegations and asserting affirmative defenses of lack of jurisdiction, failure to state a claim, improper joinder of the Governor and lack of equity (R. 19-20).

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* When this action was begun, Caroline K. Simon was Secretary of State of the State of New York and was named as a party defendant. After this appeal was taken, John P. Lomenzo became Secretary of State and, accordingly, we have revised the title of this action to indicate that fact. See Rule 48, Revised Rules of the Supreme Court of the United States.

At the opening of the trial, six district leaders of the Democratic party, including Congressman Adam Clayton Powell, intervened in the action and aligned themselves with appellees (R. 13-14, 23-31). In their answer, they denied the material allegations of the complaint and set up various affirmative defenses (R. 15-18). They also alleged that the district lines in question were drawn along partisan political lines rather than racial lines, that the effect of a judgment favorable to plaintiffs would be to deprive Negroes and Puerto Ricans of their present public offices and of fair representation in Congress and that the real parties in interest were not the named plaintiffs but the Democratic County Committee of New York County (R. 16-17).

The local municipal officials named as defendants, represented by the Corporation Counsel of the City of New York, took no active part in the defense of the proceedings (R. 32-33).

B. The Proof

On July 31, 1962, the District Court convened a statutory three-judge Court to consider appellants' claims (R. 11-12, 21-22). This Court heard evidence on August 9th, 15th and 28th, 1962.

Appellants, through the use of maps and other exhibits introduced into evidence, showed the racial composition of the 17th Congressional district and of various census tracts bordering the district (R. 196-215). They also called two witnesses, who had prepared the exhibits, to interpret their contents for the Court (R. 40-105).

At the close of appellants' case, appellees announced that they would present no oral testimony (R. 105). Instead, they introduced in evidence a certificate by the Bureau of the Census showing the composition of the old and new 17th districts (Def. Exh. A, R. 106, 219) and a series of maps of New York County Congressional districts tracing the gradual development of the present

district lines through every redistricting statute since 1911 (Def. Exhs. C-H, R. 131, 233-43).

For the convenience of the Court, we have divided the evidence introduced at the hearing into several major categories. We summarize here, for each of these categories, the salient facts presented by both sides.

1. *Racial composition of New York County:* There are 1,698,281 persons who live in Manhattan Island (New York County).* Of these, 639,692 persons, or 37.7% of the total population, are non-whites or are of Puerto Rican origin (Pl. Exh. 3, R. 46, 203). The great bulk of these persons are concentrated in Harlem—the central northeastern section of Manhattan, where they comprise 75-100% of the population of each census tract (Pl. Exh. 4-B, R. 75, 207). On the other hand, there are relatively few non-whites and Puerto Ricans who live in the 70-80 block area on Manhattan's East Side which is immediately south of Harlem; these persons comprise less than 5% of the census tracts in this area (Pl. Exh. 4-B, R. 75, 207).

The area of Manhattan covers four Congressional districts. The 17th district, which is the focus of the complaint here, takes in the bulk of the eastern and central areas of the island, including the area south of Harlem which has a relatively low concentration of non-whites and Puerto Ricans. The 18th district covers the bulk of the Harlem neighborhood. The 19th district embraces the southern and southwestern portion of the island, and the 20th district takes in the northern and northwestern areas (Def. Exh. H, R. 131, 243).

According to appellants' figures (Pl. Exh. 3, R. 46, 203), the 17th Congressional district contains 19,652 non-whites and persons of Puerto Rican origin, or 5.1% of the total

* New York County actually includes a small part of the mainland, since the boundary between New York and Bronx County does not strictly adhere to the Harlem River. The small mainland strip in New York County is included in the 20th Congressional district (R. 6; Def. Exh. C-H, R. 131, 233-43).

district population of 382,320. The 18th district contains 372,114 such persons, or 86.3% of the total district population of 431,330. The 19th district contains 126,952 nonwhites and persons of Puerto Rican origin, or 28.5% of the total district population. The 20th district contains 120,974 such persons, or 27.5% of the 439,456 persons who live in that district.

2. *Evolution of the present Congressional districts:* As a result of the 1960 census, New York lost two seats in the House of Representatives (Def. Exh. B, R. 130, 228). Accordingly, the New York Legislature redistricted the State. The redistricting Act provided for contiguous districts whose population could vary no more than fifteen percent from the State average (R. 155-56). As a result of the Act, the area covered by New York County, which formerly had included six Congressional districts, now embraced only four (Def. Exhs. G, H, R. 131, 241-43), and the boundaries of the old districts had to be redrawn.

Except for the necessary expansion of some districts and the elimination of others, the existing pattern of Congressional district lines was little changed by the new Act. The 17th district was expanded on the south to include Stuyvesant Town, a housing development containing 22,405 persons, and a large area on the East Side, between 59th and 89th Streets, containing 101,716 persons (R. 76-77). It dropped 806 persons (R. 86) in a two-block strip from Fifth to Madison Avenues between 98th and 100th streets which was part of a hospital located in an adjoining district (R. 90-92); the old boundary, East 100th Street, no longer existed (R. 85-86). Otherwise, the district lines remained the same (Pl. Exh. 4-B, R. 75, 207). The old 16th and 18th districts were merged into the new 18th district, the old 19th and 20th districts were merged to form the new 19th district, and the old 21st district was expanded to the south to form the area comprising the new 20th district. Wherever possible, existing territorial alignments were preserved (Def. Exhs. G, H, R. 131, 241-43).

The districting pattern, except for necessary changes to assure equality of population, remained remarkably similar to that which was created by the 1941 redistricting (Def. Exh. F, R. 131, 239). On the whole, the 17th district retained the same contours throughout this period.

3. *Role of race in the evolution of the present districts:* Although the complaint charged that "the unconstitutional districting herein complained of has existed for many years" (R. 6) and that the Legislature, in enacting successive statutes establishing Congressional Districts in the County of New York, "has redrawn the boundaries of such districts in accordance with shifts in non-white population and population of Puerto Rican origin so as to perepetuate and aggravate * * * the segregation of voters by race and place of origin * * *" (R. 7), the record is barren of any evidence of the role of race in the evolution of the present districts. Appellants state that it "seems quite likely" that their allegations regarding the racial motivation of past districtings are true, but that they "did not find it necessary" to obtain the "extensive statistical data" that would be necessary to prove those allegations (Br., p. 27).

4. *Racial changes in the 17th district caused by the 1961 redistricting:* There are more Negroes and persons of Puerto Rican origin in the new 17th district than there were in the old district (Def. Exh. A, R. 106, 219). However, because the expanded 17th district took in a large area from the East Side of Manhattan with a relatively low concentration of such persons (Pl. Exh. 4-B, R. 75, 207), the percentage of Negroes and persons of Puerto Rican origin in the district dropped from 6.6% in the old district (R. 104) to 5.1% in the new district (Pl. Exh. 3, R. 46, 203).

The only three changes affecting the 17th district made by the 1961 redistricting involved areas in which there

are almost no Negroes or Puerto Ricans. The two neighborhoods added, Stuyvesant Town and the East Side area between 59th and 89th Streets, are, respectively, 99.5% and 97.3% white non-Puerto Rican (R. 77). The hospital area on the north, dropped from the district, is 55.5% white non-Puerto Rican (R. 86).

5. *Racial composition of areas bordering the 17th district:* (a) *Northern border*—In general, there is a greater concentration of Negroes and persons of Puerto Rican origin to the north of the 17th district than within it (R. 52-66).

However, there is a large area consisting of two census tracts to the north of the 17th district which contain a smaller concentration of Negroes and persons of Puerto Rican origin than is found in the 17th district. This area, immediately adjacent to the 17th district, extends from Third Avenue to the East River and from 89th Street up to 94th Street, west of First Avenue, and up to 99th Street, east of First Avenue. Like many of the tracts in the 17th district to its south, its population is less than 5% Negro and Puerto Rican (R. 92-93, 99; Pl. Exh. 4-B, R. 75, 207). The area contains 10,507 persons (R. 99).

Since the presence of these two tracts adjacent to the 17th district showed that the district could have been expanded without adding to the concentration of Negroes and persons of Puerto Rican origin in it, appellants attempted to rebut the force of this evidence They produced a letter from the New York City Housing Authority (Pl. Exh. 7, R. 120, 217) showing that, in 1959, a low-cost housing project was planned for the area between 93d and 95th Streets, east of First Avenue; the letter noted that Negroes and Puerto Ricans made up a majority of the tenants in the 28 projects that were already operating in Manhattan. The letter also indicated that at some unascertained time after the original project was planned, an extension was planned; its "*tentative* boundaries, which are

still being studied" (emphasis in letter), are from 91st Street to 93rd Street, east of First Avenue. The letter did not indicate the date on which the plan to build an extension was formulated or the date on which it was made known; specifically, it did not indicate whether that proposed plan could have been before the Legislature when it passed the 1961 redistricting statute.

The letter also failed to indicate that there would be any change in the blocks between 89th and 91st Streets and 95th and 99th Streets, east of First Avenue, which are part of the same virtually all-white non-Puerto Rican census tract as are the blocks discussed in the letter. Neither did it indicate that there would be any projects built in the adjoining and much more populous tract between First and Third Avenues—where most of the 10,507 persons in the area under discussion live.*

(b) *Southern border*—There are many census tracts south of the southern boundary of the 17th district which have low concentrations of non-whites and persons of Puerto Rican origin (R. 100; Pl. Exh. 4-B, R. 75, 207).

A tract which takes in part of the southern boundary of the district, extending between Broadway and the Bowery south of 4th Street, is 12.6% Negro and Puerto Rican in the portion which is outside the district and 8.2% Negro and Puerto Rican within it (R. 69).

On the other hand, a triangular tract north of it, within the 17th district but adjacent to its boundary line, is 35.9% Negro and Puerto Rican (R. 74; Pl. Exh. 4-B, R 75, 207).

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* The tract discussed in the letter (Tract 152) contains 2,664 persons. The tract to its west (Tract 154), apparently not covered by the City's plans for a housing project, contains 7,843 persons. U. S. Bureau of the Census, *U. S. Censuses of Population and Housing:* 1960 Census Tracts, Final Report PHC(1)—104, Part I, Table P-1 (1962).

And the tract to the west of Stuyvesant Town, which is adjacent to the district but not included within it, is 12.2% Negro and Puerto Rican (R. 88; Pl. Exh 4-B, R. 75, 207).

(c) *Western border:* From 14th Street to 26th Street, the areas west of the western border of the 17th district generally have a somewhat higher percentage of Negroes and Puerto Ricans than do the adjoining areas within the district (R. 70-71). However, in the border tract between 26th and 30th Streets, 71.2% of the population of the tract who live within the district are non-whites or persons of Puerto Rican origin whereas only 48.7% of the tract's population living outside the district are Negroes or Puerto Ricans. Such persons number less than 5% of the population on either side of the border tract which extends from 30th to 34th Street (R. 71; Pl. Exh. 4-B, R. 75, 207).

From 34th to 50th Streets, the areas within the 17th district and bordering on its western border, totalling 6,397 persons, are generally more heavily Negro and Puerto Rican than the areas adjoining them that are not included within the district (R. 71-72, 103; Pl. Exh. 4-B, R. 75, 207). The concentration of Negroes and Puerto Ricans in this area varies from 27.1% (R. 102) to somewhere between 15-20% (R. 72). The border area between 50th and 54th Street, within the district, contains 1,573 persons of whom 10-15% are Negro or Puerto Rican (R. 72).

The portion of the western boundary of the district which lies between 54th and 73d Street consists of a series of split census tracts (Pl. Exh. 4-B, R. 75, 207). In some of these, there is a somewhat greater concentration of Negroes and Puerto Ricans outside the district than in it (R. 73-74). On the other hand, in the border tract which lies between 62nd Street and 66th Street, 783 Negroes and Puerto Ricans live inside the district while only 7 of these persons live outside the district; in percentage figures, 16.6% of the tract's population within the district is Negro or Puerto Rican, while 7.8% of the tract's population not in the district is composed of these persons (R. 73).

In sum, if one were to straighten the western boundary of the 17th district by continuing the Central Park West line all the way down through Eighth Avenue, and therefore eliminate any turns or split census tracts, the district's racial composition would remain almost exactly the same; 2,830 Negroes and persons of Puerto Rican origin would no longer be within the district, while 2,888 such persons would come into the district. The only significant result would be that the 17th district would suffer a net loss of about 19,000 persons who now live within its borders (R. 80-82).

6. *Hypothetical expansions of the 17th district:* Appellants also introduced in evidence hypothetical expansions of the 17th district on its northern and southern boundaries, respectively. These showed: (a)—If Stuyvesant Town were dropped from the district, the western border straightened, and the district expanded into Harlem so as to make up for the dropped population and to bring the entire population of the district up to 425,014, the expanded district would contain 59,486 Puerto Ricans and Negroes, whereas it now contains 19,652 such persons (R. 82-83) (b)—If the northern boundary of the district ran straight across East 98th Street east to Third Avenue, and the rest of the district were expanded so as to take in the census tracts south and west of Stuyvesant Town, there would be 36,134 Negroes and persons of Puerto Rican origin in the expanded district, or 8.5% of the total expanded population of 427,351 (R. 86-87).

7. *Hypothetical redistrictings of New York County:* Appellants also presented three hypothetical districtings for Manhattan "with relatively equal total population and trying to make the boundary lines and the pattern as simple as possible" (R. 88, Pl. Exh. 6; R. 90, 211-215).

The first of these envisioned districts dividing the island into northern, southern, east-central and west-central dis-

tricts. The northern district contained 59.1% Negroes and Puerto Ricans; the western, 37.1%; the eastern, 32.2% and the southern, 22.3% (R. 88, 211).

The second hypothetical districting was a variation of the first, in which the northern and southern districts remained the same but the center of the island was divided into a south central and a north central district, containing 9.5% and 58.9%, respectively, Negro and Puerto Rican persons (R. 89, 213).

The third hypothetical districting envisioned northwest, northeast, southwest and southeast districts, whose Negro and Puerto Rican inhabitants comprised, respectively, 53.8%, 43.0%, 31.6% and 22.4% of the population (R. 90, 215).

C. Request for Stipulation.

After the close of the hearing, the Court requested the parties to stipulate to population, voting and enrollment figures for the two areas added to the 17th district in 1961—Stuyvesant Town and the East Side strip running from 59th to 89th Street—and for certain areas immediately adjoining those added to the district. Appellees promptly furnished these figures, but appellants objected to the use of this material.* The Court, instead of taking judicial notice of these figures, declined to consider the information supplied by appellees as part of the record before it (R. 175-76).

D. Opinions Below.

On November 26, 1962, the three-judge District Court dismissed the complaint. 211 F. Supp. 460 (S.D.N.Y. 1962). Each of the three judges wrote separate opinions.

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* Appellants filed a memorandum of their objections with the District Court. It appears on pages 516-30 of the original record certified by the Clerk of that Court.

Judge Moore pointed out that appellants offered no proof "that the specific boundaries created by Chapter 980 were drawn on racial lines or that the Legislature was motivated by considerations of race, creed or country of origin in creating the districts" (R. 153). He noted that the redistricting was necessary due to the reduction in New York's Congressional delegation from 43 to 41 representatives (R. 153) and that New York County's proportional share of the state's total representation was four seats (R. 157). New York's legislature adheres to the recommendation of the American Academy of Political Science that Congressional district lines be based on an ideal of substantial equality of population, with a maximum variation of 15% from average population per district (R. 156). In light of this, Judge Moore noted that the 17th district is less than 7% below the average population in the state and that appellants' reference to this district as "overrepresented" is inaccurate (R. 157-58).

Since there could be no legitimate claim that the districts were disparate in population, Judge Moore concluded that appellants actually support a "racial percentage theory" (R. 159)—claiming that the Constitution requires New York to divide its Congressional districts so as to include the same ethnic ratios in each of the four districts in New York County—while the intervenors claimed that the adoption of such a theory would itself be violative of the Constitution. Noting that the Legislature redistricted New York County preserving the general pattern of past districting acts, and that there was no proof of any previous history of racial discrimination (R. 163), and pointing out that it is not unusual to find persons of the same race or place of origin settling together within a large city (R. 164), Judge Moore held that "to create districts based upon equal proportions of the various races inhabiting metropolitan areas would indeed be to indulge in practice verging upon the unconstitutional" (R. 164) and voted to dismiss the complaint.

Judge FEINBERG concurred in the order dismissing the complaint on the ground that appellants did not meet their burden of proof (R. 171). He stated that segregated districts would be unconstitutional (R. 173), but held that inferences other than racial segregation "are equally or more justifiable" (R. 174) from the evidence submitted by appellants and, therefore, that appellants had not sustained their burden of proof. First, Judge FEINBERG pointed out that the Legislature, in eliminating two districts from New York County to correspond with the census results, "had moved the lines in a rational manner", resulting in "straighter and apparently more logical congressional lines than before" (R. 174). Nor did he find any proof that the lines were drawn in past years for discriminatory purposes (R. 174). Second, Judge FEINBERG rejected appellants' contention that the 17th district was kept small in population so as to avoid incorporating a higher percentage of non-white or Puerto Ricans, noting that "a variation of only 7 per cent from average does not . . . justify a finding of racial discrimination" (R. 175). Third, he disagreed with appellants' argument that the only available inference from the ethnic composition of the districts is one of a discriminatory legislative intent. The obvious inference, as he pointed out, is that non-whites and Puerto Ricans live in certain concentrated areas; indeed, under one of appellants' suggested plans, one district would have 9.5% non-white and Puerto Rican population, while another would have 59.1% non-white and Puerto Rican (R. 176). Failing proof of "failure to build upon prior lines in a rational, logical manner, a greater population disparity and an increase in boundary zig-zagging" (R. 176), Judge FEINBERG held that appellants had not proved their case.

Judge MURPHY dissented, believing that this Court's decision in *Hernandez* v. *Texas*, 347 U. S. 475 (1954), required him to find that appellants proved a prima facie case even though he found "a total absence of direct proof

of any specific intent by the New York Legislature" (R. 165) and did not believe that mere showing of population disparity and non-straight boundary lines (R. 165) would show such an intent. To him, the population figures alone amounted "to a mathematical demonstration that the legislation was solely concerned with segregating white, colored and Puerto Rican voters by fencing colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th)" (R. 167). He favored giving judgment for appellants declaring that the challenged portion of Chapter 980 is unconstitutional.

Summary of Argument

I.

A. Assuming arguendo that appellants stated a colorable claim under the Constitution, they bore the burden of showing that the Legislature deliberately and purposefully drew the lines of the 17th district so as to minimize the number of Negroes and persons of Puerto Rican origin voting in that district. Unless they established that the Legislature intentionally "segregated" the voters in the adjoining 17th and 18th districts, they could not possibly show any violation of the Constitution. *Snowden* v. *Hughes*, 321 U. S. 1 (1944).

It is fallacious to argue, as do appellants, that the Constitution prohibits even an unintentional pattern of "segregation" in voting districts. First, their argument fails to take into account the facts that persons of similar ethnic backgrounds often settle in the same neighborhood in large cities, thereby causing variations in the ethnic composition of adjoining Congressional districts. Such a situation is commonplace, and raises no inference of unconstitutionality. Second, their argument, if adopted, would require the Legislature to use race and national origin as bases for drawing Congressional district lines so as to assure that each district would have the proper "mix" of the

races. It would in fact force rather than forbid the use of race and national origin as criteria in districting.

B. In order to demonstrate prima facie that the Legislature used race and national origin as criteria in drawing district lines, appellants had to show an absence of any other substantial purpose for the districting. *McGowan* v. *Maryland*, 366 U. S. 420, 459, 468 (1961) (FRANKFURTER, J., concurring). In other words, they had to show that race was a more likely basis for the district lines than were other, more usual, bases of districting.

In light of this standard, their proof fell far short of the mark. The circumstance that there was a disparity in the racial composition of the 17th and 18th districts merely reflected living patterns in the City. In fact, in one of appellants' own hypothetical districtings, a district which was 9.5% Negro and Puerto Rican adjoined a district in which these persons made up 58.9% of the population. Moreover, they were unable to show that the 17th district could not be expanded or straightened without significantly altering its racial homogeneity. The evidence adduced at trial showed that it would be possible to add to the 17th district two census tracts on the northern border containing more than 10,000 persons and to add other census tracts on the southern border without increasing the percentage of non-whites or persons of Puerto Rican origin in the district. The evidence also showed that there were many border tracts within the district with a relatively heavy Negro and Puerto Rican concentration. Since a Legislature bent on excluding these persons from the district would not have included these tracts, it is obvious that the Legislature had no such attitude.

Neither could appellants' reliance on the history of the 17th district give them any comfort. The one area removed by the 1961 redistricting Act from the old 17th district was occupied by a hospital whose property spanned the border

of the district; the old boundary street no longer existed. The only two additions to the district—Stuyvesant Town and an area on the East Side of Manhattan—were made in order to expand the district boundaries in view of the fact that New York County's representation in the House of Representatives had been reduced from 6 to 4 members.

Nor did appellants' diagrams of hypothetical districts lend support to the strength of their claim. These diagrams, using full census tracts and major streets as "reasonably objective criteria" for district lines, bore no relation to any of the traditional factors which determine the boundaries of a Congressional district. If anything, the diagrams merely proved that there is nothing unnatural about the disparity in concentration of Negro and Puerto Rican voters between the 17th and 18th districts; appellants' hypothetical districts themselves had disparities which were very wide. Unlike the jury exclusion cases—where members of a particular race were not called for jury service over the course of several decades—and unlike *Gomillian* v. *Lightfoot*, 364 U. S. 339 (1960)—which involved a redrawing of the boundaries of the city so as to deprive all save four or five of its 400 Negro voters of their franchise—the "segregation" produced by New York County's Congressional districting is merely commonplace.

In sum, appellants utterly failed to present any evidence which suggested that the boundaries of the 17th district were drawn to keep Negroes and Puerto Ricans outside the district.

C. Even if appellants had presented a prima facie case, any inference of unconstitutionality would have been rebutted by a series of maps introduced by appellees showing the evolution of the present 17th district in past districting statutes. These maps showed that there was an effort to preserve existing territorial alignments in the 1961 redistricting Act. With the exception of the three necessary changes outlined above, the 17th district

retained the same contours under the 1961 redistricting as it had during the previous decade.

There is no evidence in the record that casts any taint upon the previous districting Acts. In fact, although appellants, in their complaint, charged that past redistrictings were motivated by racial considerations, they presented no evidence at all to this effect at the trial. In the absence of any such evidence, there is no reason to suspect the constitutionality of the past Acts.

Therefore, appellees showed that the 1961 Act was motivated not by racial considerations but simply by a desire to preserve previously existing district patterns of unchallenged validity.

II.

A. Appellants' assumption that it is unconstitutional for the Legislature to consider the racial composition of a neighborhood in drawing district lines is unfounded. Under well settled constitutional principles, it is assumed that all relevant facts are before the Legislature when it acts. Therefore, when the Legislature redistricts an area in which there are neighborhoods of differing ethnic composition—or even when it chooses not to redistrict existing district lines in such an area—it is making some kind of decision on the proper distribution of the ethnic groups in such neighborhoods among the various districts. The plain fact is that the Legislature not only may "consider" the fact of race but that it cannot possibly avoid doing so.

B. In weighing the racial considerations which necessarily arise in the course of redistricting, the Legislature is not controlled by any per se rule of constitutional law barring it from giving controlling effect to these concentrations. The Fourteenth Amendment does not relegate a state to a passive role in race relations. On the contrary, it leaves the state free to encourage progress in the field,

even if this requires that the state classify people by race. For example, we believe that a state may deliberately zone a school district to assure a proper racial "mix" of students and avoid de facto segregation. Any other view simply would prevent enlightened state action in the field of race relations.

C. A State Legislature, consistent with the Constitution, may decide to concentrate a racially homogeneous neighborhood in one Congressional district instead of dividing it among several districts. The Legislature, in drawing the district lines, necessarily must either concentrate or dilute a minority vote in an area which contains two or more racially homogeneous neighborhoods. A rule of law which prevents concentration of a minority in one district would, in effect, impose an unjustifiable requirement that the minority be dispersed among several districts.

Moreover, it is consistent with the purpose of the single member district system for the Legislature to concentrate a racial minority in one district instead of diluting its power over several districts. Such a minority, concentrated in one district, is able to advance its interests through a Congressman responsive to its wishes.

D. This analysis is applicable to appellants' claims under both the Fourteenth and Fifteenth Amendments. In the context of the case at bar, these two provisions are co-extensive in their protection of the right to vote. Both provisions guarantee voting equality, but neither provision immunizes a neighborhood containing a racial minority from the normal vicissitudes of districting.

III.

A. The complaint fails to state a justiciable issue, since there is no discernible standard by which this Court, in reviewing Congressional districting statutes, may choose between the alternative policies of concentrating or divid-

ing racially homogeneous neighborhoods. *Baker* v. *Carr*, 369 U. S. 186 (1962).

There is, of course, no such thing as a "neutral" Congressional district line. Any line drawn in an area which contains a heavy concentration of a particular minority necessarily concentrates the residents of that area in one district or divides them among two or more Congressional districts.

The same is true of school districts. There, too, any district line that is drawn cannot be "neutral." It must affect, one way or another, the racial composition of the school. In the case of the school district, however, there is a fixed constitutional desideratum—integration—by which the Courts may judge the district lines. *Branche* v. *Board of Education*, 204 F. Supp. 150 (E.D.N.Y. 1962).

In the case of the Congressional district, however, there is no such discernible standard. The Courts have no touchstone for deciding when a minority is better off by having its voters concentrated in one neighborhood and when it gains an advantage by being divided among several districts. Neither can they decide when the minority has achieved a "fair" balance of voting power and when the balance has swung too far towards minority rule. These are matters of political rather than judicial judgment. Their determination is part of the politics of the people and is alien to the Courts.

B. Even though the federal Courts lack standards by which to review such questions as are raised here, the states are subject to Congressional scrutiny to guarantee that they do not abuse their districting powers.

Pursuant to Article I, §§ 4-5 of the Constitution, the Congress may review the discretion of state legislators in setting up Congressional districts. This may be done either by a Congressional enactment of general statutory standards or by the refusal of the House of Representatives

to seat a Representative whose district lines do not conform to acceptable standards.

The legislative history of these two sections shows clearly that the framers of the Constitution contemplated that the Congress would exercise a federal review over state regulation of Congressional districts. In fact, Congress repeatedly has exercised its power to establish standards for districting and the House of Representatives has on several occasions entertained challenges to the seating of a member on the ground that his district did not conform to required standards. The Congress clearly has adequate powers to prevent any state from using its districting functions to the disadvantage of minority groups.

IV.

A. Relief should be denied under settled principles governing the exercise of equitable discretion, since there are no standards by which an equity Court could fashion relief in this action. The same problems which render this issue nonjusticiable also prevent formulation of a coherent decree. Since there is no judicial standard for determining what is a sufficiently "integrated" Congressional district, there can be no workable decree giving appellants the relief they seek.

Any such decree would be self-contradictory as well as vague. Since appellants have objected to the relatively low concentration of Negro and Puerto Rican voters in the 17th Congressional district, any relief presumably would involve an expansion of the 17th district to take in a greater number of such voters. However, appellants also argue that all classifications of persons by race are forbidden. If this latter premise is adopted, the equity decree itself—which would add voters to the 17th Congressional district solely because of their race—would be violative of the Constitution. This contradiction is inherent in appellants' theories, and it blocks the drafting of any decree that could implement their theories.

B. Equity should also decline to act here because the harmful effects of any decree would far outweigh the beneficent ones.

Such a decree ultimately would require that an election at large for Congressmen be held throughout the state; there is no statutory basis for appellants' suggestion that an election at large could be confined to New York County. The applicable statute, 2 U.S.C. § 2a (c) (5), requires that such an election be held where a state has lost representation but has failed to enact a valid districting measure to govern the new situation. New York would be in that position if the statute here challenged were declared unconstitutional. The election at large is contrary to the prevailing policy of Congress and would result in drastic changes in our politics. It would be especially inappropriate in this case, where the entire proof concerned a disparity in racial composition between the constituencies of only two districts of the 41 Congressional districts in New York which would be affected by any decree.

Moreover, it appears that the rights of appellants themselves would not be furthered and would doubtless be harmed by the relief here sought. An election at large would diminish and perhaps altogether eliminate the influence of the Negro and Puerto Rican voters of New York County.

C. In any event, no relief should issue against the Governor of the State, who has no connection with this this action. The Governor here, like the President of the United States with respect to a federal statute, has a continuing obligation to take care that all the laws in his jurisdiction be faithfully executed. However, this overall supervisory power in a chief executive does not make him a proper party to all cases challenging these laws. Appellants may have perfectly adequate relief, if otherwise entitled thereto, by proceeding against subordinate officers charged with enforcing the statute.

POINT I

Appellants failed to prove that the Legislature used race and national origin as criteria for determining the boundaries of the 17th Congressional district.

We shall show in this section of our brief that appellants have not even come close to proving their charge that the 17th Congressional district was "contrived" (R. 6) to exclude non-white citizens and citizens of Puerto Rican origin. For the purpose of this section only, we assume arguendo that appellants have stated a colorable claim under the Constitution.

We argue, first, that appellants bore the burden of proving that the Legislature deliberately employed race and national origin as criteria in drawing the district lines, and we take issue with their attempts to shy away from this burden. Then, we demonstrate that appellants did not make a prima facie case; in fact, their evidence is inconsistent with the notion that the Legislature strove to minimize Negro and Puerto Rican influence in the district. Next, we point out that, in the light of appellees' evidence showing the historical development of the 17th district, even a prima facie case would have to be supported by evidence that past districtings, too, were constitutionally tainted. Appellants here, in our view, presented neither a prima facie case nor the requisite proof to rebut appellees' evidence, even though they bore the ultimate burden of persuading the Court of the truth of their allegations. On this record, there is every reason to infer that the Legislature used criteria other than race and national origin to draw the lines of the 17th district.

A. Appellants bore the burden of showing that race and national origin were the criteria for determining the district boundaries.

The burden on one attacking a statutory classification is to show that it "does not rest upon any reasonable

basis, but is essentially arbitrary." *Morey* v. *Doud*, 354 U. S. 457, 464 (1957). See *Metropolitan Casualty Co.* v. *Brownell*, 294 U. S. 580, 584 (1935). Yet, after alleging—and apparently attempting to prove—that the Legislature intended to restrict the boundaries of the 17th district to avoid taking in Negro and Puerto Rican voters, appellants now argue that they were not obliged to prove that the Legislature intended to create segregated districts (Br., p. 31). Their first line of attack is that even an unintentional pattern of "segregation" of voters by race or national origin is prohibited by the Constitution. Therefore, they maintain, a mere showing of a considerable disparity between the ethnic composition of adjoining Congressional districts should be sufficient to establish a prima facie case.

The fallacies of this thoery are apparent. First, it fails to take into account the plain fact that persons of the same ethnic background tend to settle close to one another in large urban centers. The reasons for this phenomenon are legion, and they range all the way from the minority group member's desire for security to the existence of discriminatory patterns in housing. New York City is certainly no exception to this phenomenon—indeed, Harlem is known throughout the world as a center of the Negro and, more recently, Puerto Rican communities. It is certainly no surprise to find that different ethnic compositions of neighborhoods in a metropolitan center should be reflected in that area's Congressional districts. In effect, appellants are contending that they may satisfy their burden of proof by showing a commonplace situation which, we believe, exists in nearly every one of our major cities. Second, if appellants' theory is adopted, the Legislature would be forced to use race and national origin as bases for drawing Congressional district lines so as to assure that each district would have a proper "mix" of the races. Otherwise, it would run the risk of establishing

districts which had constitutionally impermissible—or at least constitutionally suspect—racial mixtures. Thus, under the "effect" theory, appellants really would mandate rather than forbid the use of race or similar factors in drawing district lines.

The Constitution countenances no such theory. In most contexts, it is clear that only an "intentional or purposeful discrimination" between persons or classes establishes a violation of the Fourteenth Amendment. *Snowden* v. *Hughes*, 321 U. S. 1, 7-8 (1944). For example, one cannot establish that there has been racial discrimination in the selection of a jury simply by showing that no Negro sat on a particular jury. *Id.* at 9. To say otherwise would be to mandate that Negroes sit on every jury. Likewise, it would be improper to allow appellants to establish that there has been discrimination in the drawing of Congressional district lines merely because there are comparatively few Negroes and Puerto Ricans in that district. To say otherwise would be to mandate that the Negro and Puerto Rican citizens of a state or city be apportioned in equal numbers among the Congressional districts of that area. Obviously, the Fourteenth and Fifteenth Amendments lend no support to such a view. It is true that in the special instance of school districts it has been argued that even de facto segregation violates the Constitution. *Branche* v. *Board of Education*, 204 F. Supp. 150 (E.D.N.Y. 1962). However, in the case of a school district "the central constitutional fact is the inadequacy of segregated education," *id.* at 153, and there can be no objection to enforced integration. In the context of a jury box or a Congressional district a mandate to "integrate" would bear no relation to any legitimate constitutional standard and would merely create a quota system without rhyme or reason.

At the very least, therefore, it was up to appellants to show that the Legislature deliberately and purposefully

drew the lines of the 17th district so as to minimize the number of Negroes and persons of Puerto Rican origin voting within it.

B. Appellants failed to present a prima facie case.

To present a prima facie case of racial discrimination, appellants had to show an absence of any substantial purpose other than the purpose to classify voters by race. *McGowan* v. *Maryland*, 366 U. S. 420, 459, 468 (1961) (FRANKFURTER, J., concurring). *Cf. id.* at 426. In other words, they had to establish that race is the more likely basis than the commonly known and expected bases of districting. Note, 72 Yale L. J. 1041, 1059 (1963).

Appellants argue primarily that they made out the necessary prima facie case by showing that the Legislature "could not have created a more segregated pattern in the congressional districts of Manhattan" (Br., p. 21). They rely on four avenues of proof to demonstrate this.

First, they say that the sharp disparity in racial composition of adjoining districts "requires an inference" that race was the basis of the districting (Br., p. 23). We believe that this statement requires little comment. As we have pointed out, the racial composition of adjoining districts may very well reflect the tendency of minority groups to live together in one part of a large city. In fact, in one of appellants' own hypothetical districtings, a district which is 9.5% Negro and Puerto Rican adjoins one in which these persons make up 58.9% of the population (R. 89).

Second, they state that the boundaries of the 17th district, the smallest district in New York County, could not be expanded or straightened without significantly altering its racial homogeneity (Br., p. 24). This statement, too, is not borne out by the record. As we pointed out in our summary of the evidence adduced at trial, it would be

possible to add 10,507 persons on the north (R. 92-93, 99)* without increasing the percentage of non-whites or persons of Puerto Rican origin in the district. Similarly, it would be possible to add many census tracts south of the district's southern boundary which have a low concentration of such persons (R. 100). Moreover, on both the southern and the western borders, there are many instances where areas included within the 17th are more heavily Negro and Puerto Rican than areas adjoining them which are not within that district (R. 71-74, Pl. Exh. 4-B, R. 75, 207). A venal Legislature would almost certainly have included the areas of lower concentration or excluded the areas of heavier concentration of these voters. Indeed, the most plausible inference to be drawn from a review of the possibilities for expanding the district is that the Legislature had no fixed attitude toward race at all.

Furthermore, there is no need on this record even to consider the effect of possible expansion of the 17th district, since it is not underpopulated as it now exists. The New York State Legislature, despite the absence of a Congressional standard (*Wood* v. *Broom*, 287 U. S. 1 [1932]), has adhered voluntarily to a maximum variation of 15% from average population per district, the variation recommended by the American Political Science Association and endorsed by former President Truman. N. Y. Legislative Document No. 45 (1961); Hearings, Standards for Congressional Districts, H. R. Comm. on the Judiciary Sub-Comm. No. 2, 86th Cong. 1st Sess., pp. 28, 31, 36 (Serial No. 10, June 24 and Aug. 19, 1959); Hacker, Congressional Districting 65 (1963). The four Congressional districts in

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* In their brief (p. 26), appellants repeat the assertion that this area is scheduled for construction of a public housing project. As we point out in our summary of the evidence, it is uncertain whether these plans were before the Legislature when it enacted the instant statute. In any event, the project plan takes in only a small part of the area here described (Pl. Exh. 7, R. 120, 217).

New York County show an even smaller variation. The average population per district throughout the State is 409,326; the allegedly "over-represented" 17th district has 382,320 inhabitants—a variation of less than 7% from the average. The most heavily populated of the three other districts, the 19th district, has 445,175 inhabitants—a variation of about 9% from average. The most stringent Congressional standard that has been proposed is a maximum 10% deviation from average; even this has been attacked by the most ardent advocates of population equality as being too stringent. Hearings, *supra*, p. 19. Thus, the slight disparities in population among the New York County districts would pass muster under the sternest proposals yet made for Congressional action.

Third, appellants state that the history of the 17th and 18th districts bears out their contentions. They harp, for one thing, on the fact that a two-block area was "inexplicably removed" in 1961 from the 17th to the 18th district, and suggest this was done because there was a relatively heavy concentration of Negroes and Puerto Ricans there (Br., p. 27). As we showed in our review of the evidence, there was nothing "inexplicable" about the "removal". It was done because the area had come to be occupied by a hospital whose property spanned both districts (R. 90-92). In fact, the old district boundary line, East 100th Street, had disappeared from the face of the map (R. 85-86). Appellants also take comfort, for some unascertainable reason, in the fact that the Legislature in 1961 added Stuyvesant Town to the 17th district, but did not include an area immediately to the west of it which they say is "more logically contiguous" to the 17th district (Br., p. 27). That area—which is no more or less contiguous to the rest of the district than is Stuyvesant Town—contains a population which is 12.2% Negro and Puerto Rican (R. 88). The record shows that there are many tracts on the border of the 17th district—where the Legislature could have omitted them from the district, if it chose to do so—

which, although included within the 17th district, have a concentration of Negroes and Puerto Ricans equal to and in many cases much greater than that in the area west of Stuyvesant Town (R. 71-74). One of these tracts is just north of the area in question, and is 35.9% Negro and Puerto Rican (R. 74).

Fourth, appellants argue that they proved a prima facie case by "drawing hypothetical district lines"—on the basis of "reasonably objective criteria"—resulting in districts which disperse Negro and Puerto Rican voters among the districts so as create less ethnic homogeneity than exists in the present district (Br., p. 28). The only two "reasonably objective" criteria which they used, other than a rough population standard, are "full census tracts" and "major streets" (Br., pp. 28-29), although they do not indicate why these have any special claim to the favor of the Legislature. They showed no relation of their proposed plans to any of the traditional factors which have motivated legislative districtings. *Cf. Baker* v. *Carr*, 369 U. S. 186, 266, 323 (1962) (FRANKFURTER, J., dissenting). And—we again repeat—one of their proposed districtings contained adjoining districts with a Negro and Puerto Rican concentration of 9.5% and 58.9%, respectively (R. 89). If appellants' hypothetical districtings proved anything, they proved that racially homogeneous neighborhoods in Manhattan are a fact of life, and that disparities in ethnic composition of the island's Congressional districts reflect that fact rather than any sinister cabal to deprive minorities of their rights.

Appellants make but one further argument to support their contention that they produced sufficient evidence to make a prima facie case. In tacit recognition of their failure to show that the Legislature "could not have created a more segregated pattern" in the 17th district (Br., p. 21), they maintain that the burden of producing evidence was on the State rather than on them (Br., p. 32). As authority for this unique contention, they cite *Hernandez* v.

Texas, 347 U. S. 475 (1954), and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

Neither case lends any support to appellants' positiion.

The *Hernandez* case states the obvious proposition that the trier of fact can infer that there has been racial discrimination in selection of jury panels where members of a particular race, some of whom were shown to be qualified for jury service, were not called for jury service but consistently ignored over the course of several decades. Appellants' bizarre reading of *Hernandez* proves too much; under it, they would likewise succeed in making a prima facie case on the barest statistical showing in virtually every large city in the union. There is no reason to suspect unconstitutionality from a commonplace showing of minority-group concentration in one neighborhood of a large city.

Nor does appellants' attempted reliance on *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), bolster their cause. *Gomillion* involved an attempt to alter the boundaries of a city in such a way as to remove all save four or five of its 400 Negro voters while not removing a single white voter or resident, *id.* at 341, thus depriving these voters of the benefits of residence in that city, including the right to vote in municipal elections. This, the Court noted, "was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering" (364 U. S. at 341)—language borrowed by appellants in the instant case—and the Court went on to state that the allegations (taken as true, since *Gomillion* came up on a motion to dismiss) were "tantamount for all practical purposes to a mathematical demonstration that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their preexisting municipal vote." And, against the claim, the city authorities were unable to suggest any legitimate function for the redrawing of the municipal boundaries. *Id.* at 342. In this case we have the very opposite of the *Gomillion* situation. The justification for the redistricting is clear; it was made necessary by New York's loss of two

Congressional seats as a result of the 1960 census. The mathematics of the redistricting is not at all startling; in fact, as we have already pointed out, a large number of non-whites and persons of Puerto Rican origin were added to the 17th district and many white non-Puerto Rican areas are adjacent to the district but not included in it. Most important, appellants suggest no reason why anyone would prefer to exclude these voters from the 17th district only to include them in an adjoining district. This is a far cry from the *Gomillion* situation, where the city authorities, by excluding Negro voters from the boundaries of Tuskegee, were able to disenfranchise them in municipal elections.

Appellants' argument that the burden of proof ought to shift to the State because "it is in a better position to adduce evidence of legislative purpose" (Br., p. 32) is neither elaborated by them nor understood by us. If true, it would apply in every case where a state statute's constitutionality is attacked—and this is surely not the law. See, *e.g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961). Moreover, there is no special information which New York possesses with respect to legislative "intent"; that intent is, of course, not ascertained by examining each legislator but by looking to extrinsic circumstances such as the coverage of the statute and its legislative history. *Cf. id.* at 459, 469 (FRANKFURTER, J., concurring).

In short, then, we believe that appellants' only possible prima facie case—even assuming arguendo that their complaint invoked some colorable constitutional right—was to show that the district was so drawn that it deliberately excluded Negro and Puerto Rican voters wherever possible. On this record, they have failed utterly to carry that burden.

C. Appellees showed that the boundaries of the 17th district are a logical outgrowth of prior redistrictings whose validity is not attacked by appellants' proof.

Of course, even if appellants presented enough evidence to require rebuttal, they would still bear the ultimate bur-

den of persuading the trier of fact that there was no "reasonable basis" other than race and national origin for the redistricting. *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961); *Morey* v. *Doud*, 354 U. S. 457, 464 (1957). It would be possible, for example, to find that even a pattern of concentration which is so rigid as to suggest a conscious manipulation of the lines may turn out, after the state presents its evidence, to have been produced by totally different considerations.

Even assuming that appellants here showed a pattern so striking that the trier of fact could infer that there had been this kind of manipulation, we believe that the series of maps introduced by appellees, showing the evolution of the present 17th district from past districting statutes, would have rebutted this inference. As we pointed out in our review of the evidence, the new 17th district has retained the same general lines as its predecessor districts created in 1941 (Def. Exh. F, R. 131, 239) and 1951 (Def. Exh. G, R. 131, 241), with the exception of changes necessary to expand its area when some other districts were eliminated because of population shifts. The changes from 1951 to 1961 involved only the dropping of the two-block hospital area (R. 90-92) and the expansion of the district to take in Stuyvesant Town on the south and a large area on the East Side (R. 76-77). In general, existing territorial alignments were preserved wherever possible in the 1961 redistricting (Def. Exhs. G, H, R. 131, 241-43).

Thus, it is inferable from the legislative history of Chapter 980 that it is the result of one of the most common of legislative judgments in drawing district lines—to preserve existing alignments as much as possible. Over the years, both a representative and his constituents will develop close ties with each other, and it may well be desirable for that reason to keep the constituency intact. Hearings, Standards for Congressional Disticts, H. R. Comm. in the Judiciary, Sub-Comm. No. 2, 86th Cong. 1st

Sess., p. 26 (Serial No. 10, June 24 and Aug. 10, 1959). Moreover, local political associations may tend to center about the Congressional district, and too frequent shifts in district lines may cause an undesirable degree of local instability. In recognition of these realistic considerations, it has been proposed in England that existing lines should be preserved even at some cost in equality of population. See *Baker* v. *Carr*, 369 U. S. 186, 266, 306-07 (1962) (FRANKFURTER, J., dissenting).

The previous districting Acts are, of course, entitled to the same presumption of constitutionality as any existing statute. If appellants, in order to overcome the force of history, desired to show that these past districtings were motivated by racial considerations, they were free to do so. *Cf. Taylor* v. *Board of Education*, 299 F. 2d 36, 38 (2d Cir.), *cert. denied*, 368 U. S. 940 (1961). In fact, as we have pointed out, they charged in their complaint that this motivation "has existed for many years" (R. 6) and that the Legislature, in each redistricting, redrew the lines "in accordance with shifts in non-white population and population of Puerto Rican origin" (R. 7). Later, however, they "did not find it necessary" to prove these allegations (Br., p. 27). Now, appellants attack Judge FEINBERG's opinion below because he "assumes the constitutionality of the 1951 statute" even though "there is no evidence of the racial and group composition of the districts established by that statute at the time it was enacted" (Br., pp. 35-36). Despite this contention, they surely cannot profit by having kept the record barren of any challenge to the previous districting Acts. The burden was upon them, not the State, to show the lack of basis for the districting—and they did not meet that burden at all.

POINT II

Appellants failed to state a claim under the Fourteenth or Fifteenth Amendments.

In the previous section of our brief, we assumed arguendo that appellants stated a colorable claim under the Constitution, and we argued that they did not present evidence sufficient to support that claim. In this section, we put aside that assumption and take issue with appellants' contention that a state legislature violates the Constitution by deliberately concentrating a racially homogeneous neighborhood in one Congressional district instead of dividing it among several districts.

A. The Constitution does not prevent the Legislature from considering the racial composition of a neighborhood when it is drawing Congressional district lines.

Before we discuss appellants' theory that the Constitution forbids all classifications based on race or national origin, we must take issue with appellants' implicit assumption that it is possible for the Legislature to avoid deciding whether to concentrate a racially homogeneous neighborhood—such as Harlem, on the one hand, or the East Side, on the other—in one Congressional district or whether to divide it among several districts.

We do not believe that a Legislature can avoid this decision. Whatever district lines it chooses will either concentrate or divide the neighborhood. Whether it redistricts the area or simply does nothing and accepts the status quo, it has for better or worse made a distinct choice. *Cf. Miller* v. *Schoene,* 276 U. S. 272, 279-80 (1928). And, of course, it is alien to constitutional doctrine to inquire whether the Legislature or its members had actual knowledge of the racial composition of any given neighborhood or district. Under our system of judicial review, it

is assumed that all relevant facts are before the Legislature; the only question for the Courts is the legislative power to act upon those facts. *United States* v. *Des Moines Ry.*, 142 U. S. 510, 544 (1892).

To be sure, there is a distinction between a Legislature which simply districts an area which has wide ethnic disparities, knowing of these disparities, and one which displays a paranoid tendency to hunt out every small cluster of voters belonging to a particular ethnic group in order to single them out for special treatment. We think, for example, that appellants go too far when they define "intent" simply by stating that Legislatures intend "the natural consequence of their acts" (Br., p. 32).* There are varying degrees of purpose with which a Legislature may address itself to a task, and it may even be possible to determine which of several purposes was "primary" and which was "secondary".

But the fact remains that the Legislature must make some kind of decision in districting. There can be no racially "neutral" Congressional district, and the effects of a given combination of district lines will be the same whether the legislative decision underlying the lines is based upon indifference or upon a well-developed, coherent plan. The situation is reminiscent of the familiar context of school districting where, as here, public officials must make a choice—one way or another—as to how a neighborhood is to be divided. In the school districting cases, it has been argued with much force that the State "cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted." *Branche* v.

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* If "intent" were thus defined—and if the Court accepted appellants' position that any classification based on race must be constitutionally tainted—it would follow that there could be no constitutional redistricting of Manhattan, since every such districting would manifest an "intent" to either concentrate or divide neighborhoods such as Harlem.

Board of Education, 204 F. Supp. 150, 153 (E.D.N.Y. 1962). If it is arguable, as in *Branche*, that the distinction between "accepting" the result of a districting and "planning" it is too thin a hair on which to save state action from the taint of unconstitutionality, it surely is absurd to use the same distinction to strike down a state statute because the Legislature "considered" the effects of race instead of merely "accepting" it. The plain fact is that the Legislature not only may "consider" the effects of race but that it cannot possibly avoid doing so.

B. The Constitution does not forbid the states from classifying persons by race in order to achieve a legitimate purpose.

If a Legislature may "consider" race, may it also go further and deliberately single out members of a particular race or other ethnic group for special treatment? Here again, we think the answer must be "yes".

The fate of the very principle of *Brown* v. *Board of Education*, 347 U. S. 483 (1954), hangs upon the answer to this question. For example, the Commissioner of Education of New York State has issued a sweeping order requiring local school boards to integrate school districts which reflect, albeit accidentally, a marked imbalance in racial composition. N. Y. Times, June 19, 1963, p. 1 col. 6. Soon after, the New York City Board of Education announced that it would allow Negro and Puerto Rican children to transfer from neighborhood schools with racial imbalances to other schools in the city. N. Y. Times, Aug. 26, 1963, p. 1 col. 1. If the Courts were to adopt appellants' position that a state never may use race as a basis for classification, the pupil transfer program would have to be upset—and the state would be powerless to end de facto segregation.

It is one thing to mandate a state to treat all men fairly, no matter what their color, creed or country of origin. It

is quite another matter to prevent the state from acknowledging that there are problems in the area of race relations which demand an attitude of action rather than neutrality. *Cf. Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963): The latter position unjustifiably tortures decisions furthering progress into strait-jackets preventing enlightened state action.

C. The Legislature, consistent with the Constitution, may decide to concentrate a racially homogeneous neighborhood in one Congressional district instead of dividing it among several districts.

We now have established, first, that a Legislature may "consider" race in drawing Congressional district lines and, second, that there is no per se prohibition against classifications by race. We now turn to the ultimate question—may a Legislature decide to concentrate a racially homogeneous neighborhood in one Congressional district?

The problem here is somewhat different from that which is raised by the actions of school boards combatting de facto segregation. In the school cases, "the central constitutional fact is the inadequacy of segregated education," *Branche* v. *Board of Education*, 204 F. Supp. 150, 153 (E.D.N.Y., 1962), so that there is in those cases but one direction—integration—in which the state is permitted to move. In the case of Congressional districts, there is no single permissible route; rather, it is a matter of judgment in the particular case whether the minority will be advantaged most by concentrating its strength in one district or by dispersing its forces among several districts.

But this is a decision which must be made—for any districting statute in an area containing two or more racially homogeneous neighborhoods must either concentrate or dilute the minority's vote. A rule against concentration

would in effect be a mandate to disperse the minority among several districts. For better or worse, the choice cannot be foreclosed.

Indeed, in light of the purposes of the single-member district system, it would be anomalous to prohibit the Legislature from using race as a criterion for Congressional districting. The obvious aim of the single-member district is to secure representation to a number of citizens who form a majority of a single district but a minority of the entire multi-district unit. Thus, it guarantees that minority interests will have a voice in the Legislature. See Hearings, H. R. Comm. on the Judiciary Sub-Comm. No. 3, 87th Cong. 1st Sess., pp. 127, 129 (Serial No. 9, Aug. 24 and Aug. 30, 1961); Hacker, Congressional Districting 43 (1963); Bickel, *The Durability of Colegrove* v. *Green*, 72 Yale L. J. 39, 43 (1962).

It needs no elaboration that race relations is one of the burning issues of our times. Nor does it require exposition that minority groups, such as Negroes and Puerto Ricans, share very legitimate common concerns which they would wish to urge upon the Congress. To concentrate them in one district, where they may make their power felt, is simply a logical facet of our representative system. To require that they be dispersed over several districts—the only other logical alternative—is at best dubious policy and certainly raises many more constitutional problems than it purports to solve.

D. This case involves no abridgment of Fifteenth Amendment rights.

We believe that the above analysis is applicable to appellants' claims under both the Fourteenth and Fifteenth Amendments.

As appellants themselves point out (Br., p. 37), there are no important distinctions between the guarantees of

these two provisions of the Constitution with respect to the case at bar. *Compare Nixon* v. *Herndon*, 273 U. S. 536 (1927), *with Smith* v. *Allwright*, 321 U. S. 649 (1944). Thus, if a state arbitrarily removed the right of a Jew or a Catholic to vote in municipal elections, *cf. Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), there would be a violation of the Fourteenth Amendment. See *Baker* v. *Carr*, 369 U. S. 186, 266, 300 (1962) (FRANKFURTER, J., dissenting). On the other hand, the removal of a voter from his municipal franchise because of his race would be a clear violation of both provisions of the Constitution. Note, 72 Yale L. J. 1041, 1055 (1963).

Despite their equation of the Fourteenth and Fifteenth Amendments, appellants do suggest at one point that there is a special windfall inherent in the latter provision. They seem to contend that there has been a violation of the Fifteenth Amendment because the 18th district, predominantly Negro and Puerto Rican, has "less voting power," *i.e.*, greater population, than the predominantly white 17th district (Br., p. 38). Obviously, there is no merit in this suggestion. As we have pointed out, all the Congressional districts in New York County are well within the range of substantial population equality. The Fifteenth Amendment certainly does not require that districts containing racial minorities be treated differently from any other districts. Moreover, the 18th district has the second smallest population of the four districts in New York County, and it is inconceivable that there could be any charge of racial bias resulting from the population figures.

We believe, therefore, that appellants have not raised a claim with respect to either the Fourteenth or Fifteenth Amendments. These provisions are a guarantee of voting equality, but they do not and cannot immunize a neighborhood containing a racial minority from the normal vicissitudes of districting.

POINT III

The complaint fails to raise a justiciable issue.

Appellants, relying principally on *Baker* v. *Carr*, 369 U. S. 186 (1962), and *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), have sought to clear the hurdle of justiciability by phrasing their complaint in terms of Fourteenth and Fifteenth Amendment prohibitions against racial discrimination. Their attempt, however, falls far short of the mark. Two crucial elements in this case make it clear that it is not amenable to judicial determination. First, there is a total absence of judicially manageable standards for determining whether New York must divide a racially homogeneous neighborhood among two or more Congressional districts. Second, as a consequence of the lack of such standards, the Constitution clearly commits this issue to a coordinate federal branch, the Congress. See *Baker* v. *Carr, supra*, 369 U. S. 186, 210, 217, 226 (1962).

The issue here, as we shall show, contrasts vividly with the claims held justiciable in both the *Baker* and *Gomillion* cases. In fact, this Court found the claim in *Baker* justiciable precisely because the issues it raised did not require the Court to make the kind of policy determination reserved for the Congress. In the opinion, Mr. Justice BRENNAN noted (369 U. S. at 226):

> "We have no question decided, or to be decided, by a political branch of government co-equal with this Court. * * * Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking."

A. There is no discoverable constitutional standard by which this Court, in reviewing Congressional districting statutes, may choose between the alternative policies of concentrating or dividing racially homogeneous neighborhoods.

Appellants ask this Court to make a sweeping policy determination for which there is a total lack of criteria appropriate for judicial consideration. Any statutory classification based upon race or place of origin is, they contend, necessarily unconstitutional (Br., p. 18). In effect, they argue that a Congressional districting statute may not reflect existing patterns of ethnic concentrations, even in relatively compact neighborhoods.

Although appellants maintain that the State can draw racially "neutral" (Br., p. 31) district lines in an area such as Manhattan, we believe that this contention is untenable. Any lines that are drawn necessarily concentrate the voters of a neighborhood in a single district or disperse them among two or more districts.* A neighborhood made up of persons of one or two minority groups—such as Harlem, the neighborhood embraced in the 18th Congressional district—is no exception. No matter what kind of so-called "objective" criteria the Legislature employed—plaintiffs suggest only the use of full census tracts and of major streets—there would still remain for the legislative choice an almost infinite variety of possible boundaries, each of which would create districts having differing ethnic makeups. And, as we have observed, the individual legislator could hardly be expected to be ignorant of the racial composition of the areas

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* The notion that "neutrality" would eliminate the claimed evil of districts having an overwhelming concentration of members of a single race was refuted by appellants' own proof. One of the supposedly "neutral" districts which they envisioned (Pl. Exh. 6B, R. 89-90, 213), showed an absence of Negro and Puerto Rican influence which differed little from the condition existing in the 17th district under the present districting.

encompassed in each district. This is particularly true of an area such as Manhattan, where neighborhoods like Harlem and the East Side present such contrasts of race and other characteristics. In short, the standard of "neutrality" is not a touchstone; it is, rather, a hopeless myth.

The crux of the problem is that, in districting, it is possible neither to say that race is irrelevant nor to locate a clear or fixed desideratum for the use of racial standards. Thus, the instant case raises issues of justiciability which are absent from the many areas in which classifications by race previously have been scrutinized by the Courts.

In the bulk of the cases in which racial classifications have been struck down, the use of race as a criterion was utterly unreasonable. Obviously, there can be no warrant for using a man's color to determine whether he shall be qualified for jury service, *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958), or whether he shall be allowed to vote in a given municipality, *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), or a given election, *Nixon* v. *Herndon*, 273 U. S. 536 (1927), or whether he shall be allowed to purchase the home of his choice, *Progress Development Corp.* v. *Mitchell*, 182 F. Supp. 681 (N. D. Ill., 1960), *rev'd on other grounds*, 286 F. 2d 222 (7th Cir., 1961), or whether he shall be allowed to sit in a seat of his choice at a public facility, *Johnson* v. *Virginia*, 373 U. S. 61 (1963). In each of these cases, race was a plainly irrelevant criterion—it was both unnecessary and improper for the State to give any consideration to the race of the individual upon whom it exerted its power.

In still another class of cases, the Courts may review the use of racial criteria, even though their use is not per se prohibited, because there is a fixed desideratum against which a particular case may be measured. We have indicated our belief that the school segregation cases are of this type. In any context in which neighborhoods must be

placed in a given district—whether it be a school district or a Congressional district—we believe it is no part of wisdom or reality to insist that districting can only be done by public officials who live in blissful ignorance of the ethnic composition of the neighborhoods they serve. Each of the many possible ways in which the neighborhood may be related to the district has different consequences for the racial balance of the school or the voting unit, and a wise public official cannot shut his eyes to them.

In the case of the school district, it is arguable that he is obliged by the Constitution to arrange the lines so as to assure diffusion of the races throughout the district. This is so because segregated education deprives the minority group of equal educational opportunities. *Branche* v. *Board of Education*, 204 F. Supp. 150 (E.D.N.Y., 1962). *Cf. Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). In any event, even if the Constitution does not require that public officials change existing lines to promote integration of schools, it at least provides a clear guide by which to gauge their conduct when they do redistrict—they must avoid segregation and promote integration.

In the case of the Congressional district, there is no such discernible standard. If a minority group concentrated in one neighborhood is to have a decisive voice in the election of a Congressman, it may be desirable to include the entire neighborhood in one district so as to make the most of the minority's voting power. On the other hand, it may be that the minority could benefit most if a neighborhood were divided among several districts so that it could exert an important and perhaps controlling influence in each. And to complicate matters all the more, any proposed district lines which concentrate the minority in one district simultaneously lessen its power in the adjoining districts; likewise, a districting which diffuses the minority's power lessens its influence in the district in

which it ordinarily predominates. Only a judgment rooted in practical politics can determine which course is most conducive to the minority's position. Over and above that is the deeper and perhaps unanswerable question as to the proper balance of representation between the minority group and its neighbors.

Mathematics, too, adds to the list of imponderables here. A holding that concentration is constitutionally forbidden would put the Courts in the position of having to decide what is a sufficiently integrated district. If 5.1% integration (as in the present 17th district) is not constitutionally sufficient, what is the proper measure?* Plaintiffs' Exhibits 6A (R. 211, 88-90) and 6C (R. 215, 88-90) suggest that lines could be drawn through Harlem so as to make it possible for white non-Puerto Rican voters to control all four of Manhattan's districts. Dilution of a Negro and Puerto Rican vote would thus be achieved, but appellants' conclusion that Negroes and Puerto Ricans would have the pivotal votes in all four of such districts (Br., p. 19) does not necessarily follow—they could easily become the forgotten voters of each district. In any event, the political effect of such a districting is certainly open to conjecture. So, too, are the social and psychological effects—there is no more reason to think the effects will be beneficial for society in general, or for Negroes and Puerto Ricans in particular, if the districting dilutes their vote than if it concentrates it. The sure guide to the conscience of public officials and the standards of judicial review which is present in the case of school districting is completely absent in the case of Congressional districting.

This is not to say, however, that the use of racial criteria in districting statutes can never be subject to judicial review. Where there is an unequivocal with-

* Appellants appear to suggest (Br., p. 9, R. 86-87) that 8.5 per cent integration of Manhattan's 17th district would have been constitutionally sufficient.

drawal of the vote and hence of the advantages the ballot affords, solely on the basis of the affected citizens' race, the Fifteenth Amendment's clear prohibition against such state action is obviously an applicable criterion. *Gomillion* v. *Lightfoot*, 364 U. S. 339, 346-47 (1961). In such a situation, it matters little whether the right to vote is taken away by an outright statutory prohibition or a more subtle *Gomillion*-type gerrymander. Either is amenable to judicial scrutiny. Similarly, if there were in any state a discernible pattern of concentrating minority groups in Congressional or legislative districts having populations significantly greater than the average district, *cf. Baker* v. *Carr*, 369 U. S. 186 (1962), this would seem to make out a prima facie case of abridgment of the right to vote under both the Fifteenth Amendment and the equal protection clause. In each of these instances, there are adequate judicial standards for gauging the issue presented.

In the instant case, however, there is no touchstone. There are no significant population inequalities in the New York districts, there is no withdrawal of the right to vote in a Congressional election, and there was a clear necessity for the Legislature's redrawing of the lines in 1961. There simply is no way for a Court to measure the relative merits of a districting statute which tends to concentrate minorities in one district as against one which tends to disperse them among several districts. This is the heart of the "political thicket", *cf. Colegrove* v. *Green*, 328 U. S. 549, 556 (1946) (opinion of FRANKFURTER, J.), where conflicting theories of representation in a democracy become entwined with the competing interests of minority groups and the forces of partisan politics.

It is the legislative struggle, not the judicial process, that must produce a determination, conscious or unconscious, that in a particular situation one or more groups' influence should be reflected in a districting statute. It is a kind of determination which is peculiarly one of feeling; of gauging the temper of the people, the needs of the

times, and the practicalities of elective office. It is a determination which is an ever-present part of the politics of the people and one which is as alien to the judiciary as is the management of the budget or the selection of public officers.

B. The right of minorities to fair representation in the House of Representatives is adequately protected by Congressional review of state districting legislation.

We have suggested that the distribution of racially homogeneous adjoining neighborhoods among Congressional districts is a matter of policy-making appropriate to legislative, not judicial, resolution. This is not to say, however, that state legislatures have total license in this area to follow districting policies which stray from the course of statesmanship and disregard the purposes of the single-member district system. There is a federal review —but it lies with the Congress.

Much as judicial review of state action is appropriate where there are judicially ascertainable and manageable standards, so, too, the Constitution provides for an analagous Congressional review of state action which lies in the realm of political choice. In the case of Congressional districting, the Congress is specifically provided by the Constitution with the power to impose a federal standard to curb abuses by state legislatures of their districting powers.

Article I § 4 provides that

> "The Times, Places and Manner of holding elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations . . ."

Article I § 5 provides that

> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, . . ."

It would seem that, pursuant to these provisions, there are two principal methods by which the Congress could

guard against excesses in districting by state legislatures. First, Congress could enact general standards; for example, it could require that representatives be elected from districts which are compact, contiguous and of substantially equal population. Second, Congress could exercise the power, inherent in Article I § 5, of refusing to seat an individual elected from a district which did not conform to appropriate standards. These two procedures obviously are tied closely to each other. For example, while the Congress might enact some standards which, once the initial policy were established, would be appropriate for judicial as well as Congressional consideration, other standards would remain suitable for enforcement only by the Congress itself, under Article I § 5. Similarly, while formalized standards might be a guide to Congress in exercising its powers under Article I § 5, it surely would be possible for a House to determine on an ad hoc basis simply that a state legislature had overstepped the bounds of reasonable discretion in creating a particular district.

The legislative history of Article I §§ 4 and 5 of the Constitution shows clearly that the framers contemplated that the interest of the federal government would be safeguarded by the power of Congress to exercise a federal review over state regulation of Congressional elections.

The two sections were adopted by the Philadelphia Convention* after a minimum of debate—apparently none at

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* When considered on the floor of the Convention, the provisions were a part of the draft Constitution submitted by the Committee on Detail on August 6, 1787. They appeared as Article VI § 1 and Article VI § 4 of the draft, *viz*:

> "Article VI—Sect. 1. The times and places and manner of holding the elections of the members of each House shall be prescribed by the legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.
>
> * * * * * *
>
> Sect. 4. Each House shall be the judge of the elections, returns and qualifications of its own members."

2 Records of the Federal Convention of 1787 (Farrand, ed. 1911), pp. 179, 180.

all in the case of the present § 5. 2 Records of the Federal Convention of 1787 (Farrand, ed. 1911), pp. 239-42, 254. The only real debate in connection with adoption of the provisions was on a motion to strike the provision that the laws and regulations of the state governments could at any time be altered by the legislature of the United States. James Madison and Rufus King argued vigorously against the motion and in favor of giving a controlling power to the national legislature. *Id.*, 240-42. The motion to strike the provision failed. Following the adoption of a change of verbiage—meant, according to Madison, "to give the national legislature a power not only to alter the provisions of the states, but to make regulations, in case the states should fail or refuse altogether"—the present Article I § 4 was adopted in substantially its final form.* *Id.*, 242.

The debates in the various state ratification conventions reveal a definite assumption, on the part of both the opponents and the defenders of the new Constitution, that Article I §§ 4 and 5 had the effect of lodging ultimate control over the conduct of Congressional elections in the Congress. Madison, for example, argued in the Virginia Convention that (3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution [Elliot ed., 2d ed. 1854], p. 367):

> "Should the people of any state by any means be deprived of the right of suffrage, it was judged proper

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* As amended on the floor of the convention, the provision—Article VI §1 of the draft of the Committee on Detail—read as follows:

> "The times, and places, and manner, of holding the elections of the members of each House, shall be prescribed by the legislature of each State; but regulations, in each of the foregoing cases, may, at any time, be made or altered by the Legislature of the United States."

See 2 Records of the Federal Convention of 1787 (Farrand, ed. 1911), pp. 179, 242.

that it should be remedied by the general government. It was found impossible to fix the time, place and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution. And, considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people it was thought the particular regulations should be submitted to the former, and the general regulations to the latter. Were they exclusively under the control of the state governments, the general government might easily be dissolved. But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised . . ."

Similarly, Charles Cotesworth Pinckney contended in the South Carolina Convention that (4 *id.* at 303):

". . . it is absolutely necessary that Congress should have this superintending power, lest, by the intrigues of a ruling faction in a state, the members of the House of Representatives should not really represent the people of the state, and lest the same faction, through partial state views, should altogether refuse to send representatives of the people to the general government."

See also 1 *id.* 21-35, 48-51 (Debate in the Massachusetts Convention); 3 *id.* 9, 60, 175-176, 366-367 (Debate in the Virginia Convention); 4 *id.*, 50-72 (Debate in the North Carolina Convention). It is perhaps worthy of note that at least six of the states which ratified the Constitution—Massachusetts, New Hampshire, New York, Rhode Island,

South Carolina and North Carolina—did so on the understanding that an amendment restricting the power of Congress over the conduct of elections would be considered by the first Congress. 1 *id.* at 318-337. Of course, no such amendment was ever adopted.

Alexander Hamilton thus summarized the essential problem, and its resolution by the framers of the Constitution (The Federalist, No. 59):

> "It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every possible change in the situation of the country; and it will therefore not be denied that a discretionary power over elections had to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety."

Congress has on a number of occasions exercised its power to establish standards for the states to follow in making laws to govern the election of representatives. In 1842 it established for the first time the requirement that representatives be elected from districts (5 Stat. 491).

Subsequent federal reapportionment acts included requirements that districts be compact, contiguous and of substantially equal population (12 Stat. 572 [1862], 17 Stat. 28 [1872], 31 Stat. 733 [1901], 37 Stat. 13, 14 [1911]. The 1929 federal reapportionment act (46 Stat. 21) omitted the requirements of compactness, contiguity and equality in population of districts, and this Court subsequently held that those requirements had thereby been abrogated. *Wood* v. *Broom*, 287 U. S. 1 (1932). The presently existing statute, 2 U.S.C. § 2a, does not require that representatives be elected from single-member districts but does appear to prefer that system to elections at large.

Congress has in the past also exercised its power to consider whether a particular state districting measures up to federal standards. The House of Representatives, as well as the Senate, has on several occasions entertained challenges to the seating of a member on the ground that his district did not conform to required standards. See 45 Cong. Rec. 8699-8709 (1910); Beard, American Government and Politics 129-35 (10th ed., 1949). Moreover, statutory provisions exist which set forth at some length the procedures to be employed in contesting an election for representative. See 2 U.S.C. §§ 201-226.

Previous decisions of this Court lend further support to the proposition that Congress has a general supervisory power over the election of representatives, including the manner in which a state is divided into Congressional districts. See *Ex parte Seibold*, 100 U. S. 371, 383, 387 (1879); *Ex parte Clarke*, 100 U. S. 399 (1879); *Ex parte Yarborough*, 110 U. S. 651, 660 (1884); *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565, 569 (1916).

It is one thing to say that the states may not deal unfairly with minority groups in drawing Congressional district lines. But it is quite another thing to argue, as do appellants, that the Courts should determine in each instance whether a minority's interests are best served

by concentrating it in one district or dividing it among several districts. The factors comprising any such determination are neither within the competence of the Courts nor within the tradition of our judicial system. They involve judgments which can be made only by the political branches of government—and then only with great difficulty. The guardian of federal review in such a case is, and must be, the Congress and not the Courts.

POINT IV

Relief should be denied under settled principles governing the exercise of equitable discretion.

In their complaint, which was brought on the eve of the 1962 Congressional elections (R. 19), appellants sought an injunction restraining the primary and general elections for members of the House of Representatives from New York County (R. 7-8) and an order that (a) the forthcoming elections be held at large in New York County unless the State Legislature enacted a "valid redistricting" in New York County before the scheduled primary elections or, (b) in the alternative, that a special master be appointed to "redefine constitutionally" the boundaries of the districts in New York County (R. 8). Appellants also sought a judgment declaring that the "separate and distinct" portion of New York's 1961 redistricting act which describes the boundaries of the New York County Congressional districts violates the Fourteenth and Fifteenth Amendments to the Constitution (R. 7).

Since any relief requested with respect to the 1962 elections is now moot, appellants now have abandoned their prayer for injunctive relief and seek only a declaratory judgment (Br., pp. 39-40). They urge that, after this declaration, the New York Legislature will have an adequate opportunity to enact a law "validly" redistricting the four Congressional districts of Manhattan prior to the 1964 Congressional elections (Br., p. 40).

We believe that the relief sought by appellants is hopelessly vague, and that it merely highlights the impossible task which would face a court of equity in enforcing appellants' elusive theories. It is, of course, of no moment that they have abandoned at this stage their claim to injunctive relief and seek only a declaration of unconstitutionality. First, an equity court must apply some touchstone of constitutional theory when it reviews any Act which is passed to replace the one declared unconstitutional. Second, in the event that the Legislature is unable, for one reason or another, to redistrict the state in time for the 1964 Congressional elections, the Court must be prepared to grant specific relief. It is no part of equity's function to exercise jurisdiction "in the hope that such a declaration as is made today may have the direct effect of bringing on legislative action and relieving the courts of the problem of fashioning relief." *Baker* v. *Carr*, 369 U. S. 186, 251, 260 (1962) (CLARK, J., concurring). Unless a declaration of unconstitutionality here could be supported by an effective decree, the only proper course would be to dismiss the complaint.

It is to this problem—the impropriety of the relief sought—that we now turn. We will discuss under this topic three factors which, in our view, make it inequitable to grant relief here. First, as we have indicated, we believe there are no standards by which the Court could implement a decree. Second, we believe that the relief sought would do more harm than good. In no event could a decree be limited to New York County; on the contrary, it would necessitate a redistrictitng which would involve each of New York's 41 Congressional districts and it might also entail the alarming possibility of a Court-ordered election at large of all representatives from New York. Third, we believe that there is no warrant at all for any relief directed against the Governor of the State, since he is no more involved in this action than in any other suit challenging the constitutionality of a state law, and adequate relief could be obtained against other parties.

A. There are no standards by which an equity court can fashion relief in this action.

The relief here sought would require a judicial decree which cannot be rooted in any principled standard known to our law.

An equity Court, in fashioning relief in this case, would have to decide what is a sufficiently "integrated" Congressional district. The same problems which, in our view, render this issue non-justiciable also prevent any such formulation in a decree. First, there is no way for a Court to determine the precise point at which the minority group's power is maximized, for with every increase in the degree of "integration" in the 17th district, the degree of "dilution" of the minority's power in the adjoining Congressional district—in this case the 18th district—also increases. Second—and even more fundamental—there is no way for a Court to distinguish between relief which merely secures "fair" treatment for a racial minority and relief which over-emphasizes the minority's voting power in relation to the legitimate interests of those who live in the same locality. The long and short of it is that there is simply no way for a Court to draft a workable decree in this case.

Moreover, the relief which appellants seek is drastically at odds with the theory of their own complaint. Appellants' first premise is (Br., p. 18) that all classifications based upon race are forbidden by the Fourteenth Amendment. Yet, this theory would be violated by the relief sought. For one thing, they have suggested—and apparently attempted to prove—that the "purpose" of the statute here challenged is to create a Congressional district containing a very low percentage of Negro and Puerto Rican voters. Presumably, therefore, any relief would involve an expansion of the 17th district to take in a greater number of such voters. If their first premise is adopted, however, is it not violative of the Constitution for a Court to take race into consideration in order to add a "quota" of Negroes and

Puerto Ricans to the 17th district, even in order to increase their influence there? Moreover, appellants have also argued (Br. p. 31) that "unintended as well as intended" concentration of Negro and Puerto Rican voters in the 18th district may run afoul of the Constitution. Presumably, the relief under this theory, too, would involve transferring a number of such voters to the 17th district. Here, too, the relief clashes with the first premise—that all classifications by race are forbidden. "If the fact of racial homogeneity is regarded as the constitutional evil," are not state legislatures "forced to employ racial criteria in drawing district lines so as to avoid a constitutionally impermissible, or even constitutionally suspect, grouping of members of the same race"? Does not this test make the use of factors such as race "mandatory rather than forbidden"? See Note, 72 Yale L. J. 1041, 1056 (1963). In light of the inherent contradictions in appellants' theories, it is small wonder that no decree could be drafted that would satisfy their conditions.

The lack of standards suggests that this is a classic case where equity will not intervene, and we so urge. We submit, however, that this lack of standards also has a bearing upon the validity of appellants' abstruse theories of constitutional law. If these theories cannot be embodied in a workable decree, is this not in itself cause to doubt the initial validity of appellants' constitutional arguments? The deficiencies of the claim here as a basis for equitable relief in our view are the same deficiencies that render it faulty as constitutional doctrine. It is simply alien to the notion of Congressional districting to speak of "segregating" a voter out of a district; and it is both alien to districting and a sharp departure from our tradition to demand relief which would require the Legislature to disperse an ethnic unit in order to assure the proper "mix" of the races in each district.

B. Any relief would be ineffective in securing appellants' rights, and would cause harm far outweighing its beneficent effects.

Even if there were some conceivable standard by which a court of equity could administer a decree embodying appellants' standards of constitutionality, such a decree would accomplish little for them and would be enormously harmful to the people of the State of New York. The cure would "be worse than the disease." *Colegrove* v. *Green*, 328 U. S. 549, 564, 565 (1946) (RUTLEDGE, J., concurring).

We note first that, contrary to appellants' position, the implications of a declaration of unconstitutionality cannot be confined to New York County. First, there is absolutely no provision by Congress for an election of representatives at large from a political subdivision of a state. On the contrary, the Congress has provided that, where a state has lost representation due to population shifts but has failed to pass a valid districting measure, its representatives must be elected at large from the entire state. See 2 U.S.C. § 2a(c)(5). Second, even in the absence of this binding Congressional command, there would be no reason for a Court to assume that New York, in the face of a declaration of unconstitutionality, would continue to follow the geographic boundaries of New York County in drawing its Congressional districts. In fact, as Judge MOORE pointed out in his opinion (R. 160), in past districtings of the County, adherence to county lines has been the exception rather than the rule.* In any event, since much of the racial "imbalance" in the districts is due to the concentration of Negroes and Puerto Ricans in one portion

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* Even in the current statute, New York Laws of 1961, ch. 980, it is not unusual for a Congressional district to combine parts of two counties. For example, the 2nd Congressional district combines parts of Nassau and Suffolk Counties; the 10th, parts of Kings and Queens Counties; and the 16th, part of Kings with all of Richmond.

of Manhattan Island, it is doubtful whether any districting confined to Manhattan possibly could avoid the charge that it either concentrated or diluted the votes of these minority groups. The result of a declaration of invalidity, if no suitable redistricting plan were offered—and it is difficult to glean a standard for such a plan—would be an election at large of all 41 members of the House of Representatives elected from New York State.

We need not labor the implications of a forced election at large. In the winner-take-all grab bag which results, all minorities—whether they be racial or political minorities—are deprived of any voice in government. It is the exact antithesis "of representation by districts which the prevailing policy of Congress commands". *Colegrove* v. *Green*, 328 U. S. 549, 564, 566 (1946) (RUTLEDGE, J., concurring). It "fails to fulfill the traditional principle of Congressional representation according to districts". Statement of Mr. Justice (then Deputy Attorney General) WHITE, Hearings, H. R. Comm. on the Judiciary, Sub-Comm. No. 3, 87th Cong. 1st Sess., p. 122 (serial no. 9, Aug. 24 and Aug. 30, 1961). See 2 U.S.C. § 2a.

Despite the extraordinary and utterly unfortunate effect of an election at large or, for that matter, of a forced redistricting, appellants ask, in effect, that a declaration of unconstitutionality issue merely upon proof that there is a marked disparity in racial composition between the constituencies of two adjoining Congressional districts, the 17th and 18th districts. The defendants-intervenors, in their brief in this Court, have characterized this as a "narrow polarized view," and we agree. There is absent any reference whatsoever to any other areas in the state with a similar grievance, real or imagined. Even if there were any fault to be found with the 17th district, a decree surely would effect a cure "worse than the disease." *Colegrove* v. *Green*, 328 U. S. 549, 564, 565 (1946) (RUTLEDGE, J., concurring).

Perhaps the most striking feature of the call for the intervention of equity power here is that appellants themselves would not be helped and would doubtless be harmed by the relief here sought. An election at large would diminish and perhaps altogether eliminate the influence of the Negro and Puerto Rican voters of New York County. Neither they, nor anyone espousing their cause, could conceivably have anything to gain from the grant of relief in this case.

C. No relief should issue against the Governor of the State of New York.

It is not clear why the Governor of the State has been joined as a defendant in this action. Whatever exotic reason may have prompted this, it seems obvious that no relief should issue against him. He is no more connected with this action than he is with any of the other myriad suits which are brought to test the validity of state statutes in both the state and federal courts. In fact, appellants alleged only that the Governor "is under a duty to administer and enforce the State statue which is the subject of complaint herein" (R. 2). This is, of course, true of the Governor's role with respect to every state statute in every state of the Union. It is likewise true of the role of the President of the United States with respect to every statute enacted by the Congress. The Governor, like the President, has a continuing obligation to take care that the laws be faithfully executed. *Compare* N. Y. State Const. Art. IV § 3, *with* U. S. Const. Art. II § 3. *Cf. Phillips* v. *United States,* 312 U. S. 246, 251-52 (1941). If relief is to issue against them, it must be because that obligation makes them proper parties in every constitutional litigation.

Significantly, throughout the long history of such litigation in this Court, there is no instance of relief having been afforded against a chief executive on the basis of

so tenuous a connection to the subject matter of an action. In fact, this Court has held unequivocally that the President may not be enjoined from enforcing an act of Congress on the ground that the act is unconstitutional. *Mississippi* v. *Johnson*, 71 U. S. (4 Wall.) 475, 500 (1866). There is no reason why the same position does not apply with respect to the Governor of the State. *Morgan* v. *Sylvester*, 125 F. Supp. 380, 387 (S.D.N.Y. 1954), *aff'd*, 220 F. 2d 758 (2d Cir.) *cert. denied*, 350 U. S. 867 (1955).

This doctrine frees the chief executive of harassment from suits in the normal case without in any way impinging upon a litigant's right to ultimate relief. *Cf. Matter of Nichols*, 57 How. Prac. 395, 415, 6 Abb. N. C. 474, 495 (N. Y. Sup. Ct. 1879). This is true even where a direct order of the chief executive is challenged. For example, when President Truman ordered seizure of the steel mills in 1952, the owners of the mills were able to secure the return of their property by bringing an action against the Cabinet official responsible for executing the President's order. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

It may be that in a special case the Governor of a state involves himself so personally in an action that relief must issue against him in order to secure the ultimate rights of the litigants. The instant case, on the other hand, is distinguished only by its ordinariness in this respect, and we see no warrant for any relief against the Governor of the State of New York.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Southern District of New York dismissing the complaint should be affirmed.

Dated: New York, New York
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Respectfully submitted,

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